No. 8411

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,
vs.
Arizona Wax Paper Company and State Produce Exchange,
Appellees

Appellant's Brief on Appeal From the District Court of the United States for the Southern District of California, Central Division.

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Appellant's Brief on Appeal From the District Court of the United States for the Southern District of California, Central Division.

STATEMENT OF FACTS INVOLVED IN THIS APPEAL.

Joseph H. Grande filed a petition in voluntary bankruptcy in the District Court of the United States for the Southern District of California, Central Division, on October 10, 1934, and was declared a bankrupt, and the same was referred by the Hon. William P. James, Judge of said Court, to the Referee in Bankruptcy, Rupert B. Turnbull.

Later, William I. Heffron was appointed Trustee in Bankruptcy.

Upon the citation of said Referee Joseph H. Grande, Daisy M. Grande, his wife, Hazel D. Grande, his daughter, and others, were cited by the Trustee for examination, and on several occasions Joseph H. Grande, Bankrupt; Daisy M. Grande, Hazel D. Grande, and other persons, were put on severe, and what appears to be cross-examination, both by the Trustee and the Referee, without in any wise discovering or disclosing that Joseph H. Grande, Daisy M. Grande, Hazel D. Grande, or any other person or corporation, had in their or its possession any property belonging to the Bankrupt, or that any property was concealed either by the Bankrupt or any one in his behalf, and without specifying any specific property still retained in the possession of the Bankrupt, or the persons above named, the Trustee in Bankruptcy filed with the Referee a petition for a turn-over order, which petition did not disclose or contain any fact required by law or the rules of the procedure in bankruptcy, and based his petition for a turn-over order upon information and belief, which turn-over order was thereupon denied. Thereupon the Court dismissed said petition and permitted the same petition to be refiled, under the positive oath of the Trustee, and after hearing evidence on said petition the Referee made an order, which is found, beginning on page 3 of the transcript of the record to page 8, inclusive, which said order was certified by the Referee on the 6th of February, 1935, and filed in the Federal Court at 10 a. m. February 25, 1935.

On the 21st of February, 1935, the Bankrupt, through his attorney, filed a petition with the Hon. William P.

James, Judge of said Court, for an order to show cause why the Bankrupt should not be permitted to file a petition for review of the turn-over order. [Tr. pp. 9 to 13.] Hearing was had on the 25th of February, 1935, on said petition of the Bankrupt, and on February 27, 1935, the Court made an order denying the petition of the Bankrupt. [Tr. pp. 15 to 17.]

On the 23rd of September, 1935, the Referee in Bankruptcy, Turnbull, caused to be signed by him a certificate of compliance, which was filed in the United States District Court at 20 minutes past 3 o'clock, September 26, 1935. [Tr. p. 18.] Thereupon the Bankrupt, Joseph H. Grande, filed a petition for discharge and order thereon. [Tr. p. 19.] Order of notice was issued by the clerk of said Court on the 9th day of October, 1935. [Tr. p. 20.] In said notice part of the same as published is as follows: "Any creditor objecting to the discharge of the above bankrupt must file specifications of the grounds of his objections in writing with the clerk of the U. S. District Court at or before the time of hearing said matter as an extension of time may not be allowed for that purpose. U. S. Supreme Court form No. 58 has been prescribed for such specifications." Filed at 53 min. past 2 o'clock Oct. 9, 1935. [Tr. p. 20.] On page 21 affidavit of publication was filed at 55 minutes past one o'clock on October 23, 1935. [Tr. p. 21.] The order of notice of publication is in part as follows: "Ordered by the Court, that a hearing be had upon the same on the 2nd day of December A. D., 1935, before said Court, in the Federal Building, at Los Angeles in said District at 10 o'clock in the forenoon; and that notice thereof be published in The Los Angeles Daily Journal, * * *." On December 2, 1935, Benjamin W. Shipman, attorney for the Arizona

Wax Paper Company, filed specifications of grounds of opposition to the Bankrupt's discharge, and as such attorney verified the same at 10 a. m. December 2, 1935, in said Court. [Tr. pp. 22 to 26, incl.] On December 2, 1935, Benjamin W. Shipman, as attorney for the Sun State Produce Exchange, filed specification of grounds of opposition to the Bankrupt's discharge on behalf of the Sun State Produce Exchange, which said specifications were filed by said Shipman at 4:30 p. m. on the 2nd day of December, 1935, which specifications begin on page 27 and continue to page 30, inclusive, of the transcript, and on page 31, wherein the order referring objections to Special Master was made by the Judge of said Court, the minutes of said Court show that the opposition to the Bankrupt's discharge by the Sun State Produce Exchange was filed at 4:30 p. m. of December 2, 1935, after the time at which said specification could be legally filed.

On page 32 of the transcript is the report of the Special Master, Hugh L. Dickson, which report begins on page 32 and ends on page 45. The appeal of the Bankrupt, exceptions to report of Special Master [Tr. pp. 46 to 60] was filed on August 17, 1936. On September 15, 1936, the Court denied the appeal of the Bankrupt and the exceptions to the report of the Special Master. [Tr. p. 61.] On the 14th of October, 1936, an appeal was allowed and filed. [Tr. p. 62.] Assignment of errors, beginning on page 62 and ending on page 70, inclusive, were filed at 56 minutes past 9 o'clock October 14, 1936. Order of the Court allowing the appeal and directing the same to be filed, October 14, 1936. [Tr. p. 71.] Undertaking approved and filed on the 30th of October, 1936. [Tr. p. 74.] Praecipe of appellant. [Tr. pp. 75 to 76.] Praecipe of appellee, dated December 8, 1936, and the exception to

the filing of specification of grounds of opposition to the Bankrupt's discharge of Sun State Produce Exchange, excepted to by the attorney for the Bankrupt, which exception was allowed by the Court, filed December 8, 1936. [Tr. p. 79.]

Upon the foregoing facts Joseph H. Grande, appellant, appeals to the Circuit Court of Appeals for the Ninth Circuit, and bases his right to have the rulings of the Referee in Bankruptcy, Special Master, and the rulings of the United State District Court reversed and set aside and the Bankrupt discharged.

LAW OF THE CASE.

I.

Appellant has assigned twelve specific grounds of error, made by the United States District Court in its different rulings in the above bankruptcy procedure. Many of these errors, as specifically set forth in detail, may be covered by three general subdivisions, and in order to put the assignments of error in these three general subdivisions, the appellant does not waive the objections made in detail and upon which he relies to have this action reversed.

Preliminary to the discussion of the errors relied upon, the evidence that was called forth by the Referee and the Trustee in Bankruptcy, in the examination of the Bankrupt and in the examination of the other witnesses, could not be brought into this record, for the following reasons:

(a) The Bankrupt could not, under any circumstances pay for the testimony taken by the stenographer before the Referee and before the Trustee.

(b) The greater part of the examination of the Bankrupt, his wife, and other witnesses, called and examined by the Trustee before the Referee, disclosed nothing that was relevant or pertinent to the duties of the Referee or Trustee.

As the appellant's counsel understands the law of bankruptcy, it is in the nature of equitable relief to persons who have honestly fallen into an unfortunate situation financially, where they are overwhelmed and burdened with debts, and by circumstances over which the bankrupt has no control he is unable to meet his obligations and is continually harassed by his creditors. His only escape, whereby he may begin anew in life and be relieved of his misfortune is by turning over to his creditors all that he possesses, except what is expressly exempt by specific acts of law. This is the condition in which the appellant availed himself of a voluntary bankruptcy procedure, and when he tenders to the Court his petition and a list of all of his assets and subjects himself to the scrutiny of the Court in bankruptcy, the presumption of law goes with him, that he is acting honestly and in good faith to rehabilitate himself as the law directs. If, however, he avails himself of the benevolent provisions of the law and conceals from his creditors and from the Court any part of his assets, then he becomes civilly and criminally a subject for the Court to chastise.

The law further provides that if either the bankrupt or any other person has in his or its possession property belonging to the bankrupt, and which should be subjected to the control of the Court for the benefit of his creditors, and this concealment is actuated by the bankrupt, either alone or in concert with friends, then both are subject to

the severe scrutiny of the Court, and if by any investigation it is disclosed to the Referee that the bankrupt has concealed or is attempting to conceal property that should be turned over to the Trustee, then it is the duty of the Referee to issue a turn-over order, specifically directing the particular property that is concealed to be at once turned over to the Trustee.

The law requires that when a turn-over order is asked for that the Trustee or whoever is instrumental in asking for the turn-over order shall verify the same, not on "information and belief," but he must have positive knowledge of the facts upon which the turn-over order is sought, is true, and the specific property sought in the turn-over must be specifically and accurately named, so that the order must be of such character and force that the marshal or officer of the Court can determine from the turn-over order what particular property is sought and where it is, so that the warrant or order, based upon the turn-over order, when placed in the hands of the officer of the Court, he may be able to find the specific property charged with being concealed by the bankrupt; otherwise, no turn-over order is of any force or effect.

We bring this appeal, so far as the record shows, upon the turn-over order of February 4, 1935, and point out to the Court that the Referee in Bankruptcy in this order has recited that the original petition for the turn-over order was defective, in that it was sworn to on information and belief, and under objections of the Bankrupt said objections were sustained; that the Trustee renewed the petition by verifying it "absolutely, and not on information and belief," and the Court thereupon issued the order of February 4, 1935. [Tr. p. 3.] In this order there is

no specific finding that the Grande-California, Inc., had any property of any kind or character, and on page 5 of the transcript is the following:

> "The Court finds that no person invested any money, either as a contribution to capital assets, or otherwise, to Grande-California, Inc., either at the time it was incorporated, or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock, and all of its assets."

There is no finding, however, that the Grande-California, Inc., ever did have any assets, nor is it anywhere pointed out or suggested in the findings that the Grande-California, Inc., had any assets.

The conclusions are—

> "That the bankrupt, Joseph H. Grande, is the sole owner of all of the capital stock of said corporation, and all of its assets, including its trucks, cash, merchandise, leases and contracts, and personal property of every kind and description," etc. [Tr. p. 6.]

A fair inference, and the only just conclusion that could be founded upon this order, is that the Grande-California, Inc., had no assets, and when it is suggested by the Referee that Grande should turn over the capital stock of the corporation, all of its assets, etc., the Referee should have found what the assets were. There were no assets. Nothing could be turned over that did not exist. Then it is further ordered [Tr. p. 7] that the Trustee

> "forthwith take immediate possession of all of the assets of the bankrupt, standing in the name of Grande California, Inc., whether the same exist at Salinas, California, or elsewhere, and use all necessary force so to do."

A further part of this order is:

"That Grande California, Inc., is in fact Joseph H. Grande." [Tr. p. 7.]

There nowhere appears in the record, nor does the record anywhere disclose, that this order of the Court has been in anywise violated. If it were true, as found in the order, that Grande-California, Inc., had trucks, cash, merchandise, leases and contracts and personal property, and that Grande-California, Inc., was Joseph H. Grande, and either the Grande-California, Inc., had possession of any of the assets of Joseph H. Grande, or Joseph H. Grande had possession of any assets other than as disclosed in his petition in bankruptcy, and he failed to turn them over to the Trustee, he should have been cited for contempt for so failing to do, or he should have been arrested and prosecuted for perjury. No such procedure was followed, because there was no property upon which such procedure could be based.

Knowing the defects of such order, the attorney for Grande filed, on the 21st day of February, 1935, a motion and order against the Referee to show cause why he should not transmit to the Court a transcript of the proceedings on which the findings were made. Upon this order the Court directed that the Referee should make a response to the order on the 25th of February. In response to this order to show cause, which appears in the transcript at pages 9 to 14, inclusive, the Court denied, on page 15 of the transcript, the petition for extension of time to file a petition for review of the Referee's order of February 4, 1935.

Under the Federal procedure in bankruptcy, U. S. Compiled Statutes and Supplements thereto, it is provided that

any one dissatisfied with an order of the Referee could appeal or file a petition for review in the District Court within thirty days. Relying upon this rule the appellant in this case filed his petition on February 21, 1935, but under the rule, as marked in the opinion of the Judge of the United States District Court, denominated Rule 84, the time in which to petition for such a review was ten days. This is a local rule made by the District Court and was not known to counsel for petitioner, and no way of discovering said rule until a mistake was made as in this instance.

This case, as indicated above, being of a special equity character, this turn-over order of February 4, and the ruling of the Court upon the same on February 27, 1935, is not of such force or effect as will mar or disturb the Circuit Court of Appeals from fully considering the equitable features of this appeal.

We have heretofore pointed out the inherent weakness of the order of February 4, 1935, and will later apply the law in support of the claim of the weakness of the order of February 4, 1935.

The Referee, Turnbull, and the special master and counsel for the Trustee, endeavor to put much stress upon the decision of Judge James of February 27, 1935, and it is referred to in the master's report as a final judgment. In the two protests against the discharge of the Bankrupt, each of the protests has attached to it as an exhibit or part of the protest a copy of the order of the Referee of February 4, 1935. An attempt is made to make much of this order of February 4, 1935, and affirm that the dismissal of the application of the Bankrupt for a review of the order of February 4, 1935, as a final judgment. An examination of the judgment of February 27, 1935,

will show that it passes only upon one fact, namely, that the Bankrupt was too late under Rule 84 in filing his petition, and that was all that the Court could decide. The Court had to either say that it had jurisdiction to hear the application of the Bankrupt or it had to deny that it had jurisdiction, having held that the Bankrupt was too late in his application, that the time in which he should appear was governed by local Rule 84. That rule fixes the time for the Bankrupt to appear. The Bankrupt and his attorney, being misled by relying upon the rule fixed both by the United States statute and announced in the bankruptcy rules of the Supreme Court of the United States, relied upon those rules as governing the time in which the Bankrupt had to either appeal or file his petition for review of the act of the Referee. We concede that the local United States District Court may make rules for itself and these rules must be promulgated by the Court, but they cannot be inconsistent with or in anywise revoke a statutory rule of the United States, or a rule adopted by the Supreme Court. However, in this instance the Court held that the Bankrupt was too late, or in other words, like a passenger at a railroad station who got hold of the wrong folder and when he arrived at the station the train had gone. That is all that the Court decided, and that is all the observation the Court could make, except dicta. The Court could not hold that it had no jurisdiction because the review had not been sought in time and then proceed to discuss the merits of the case or make any observation touching the petition for review that would be in anywise binding upon any party to the action, when it held that the petition was not filed in time. The Court had to do one or the other of two things, it either had to hold that the petitioner

was too late, and having so held he could not then proceed to make observations on the merits of the case that would have any legal force, and such a ruling could not, under any form of law, be construed into making the order of the Referee of February 4, 1935, a final judgment, as held by the Master. The books are full of decisions that no finding of a Court or a subordinate branch of the United States procedure, like the Referee in Bankruptcy, can make any final order, especially so upon a default. A final judgment in bankruptcy is only secured when the facts involved have been heard upon their merits.

II.

The next point on which the appellant directs the attention of the Court is the order of the Referee of September 23, 1935. [Tr. p. 18.] This order was signed by the Referee, Turnbull, and filed with the clerk of the United States District Court on September 26, 1935, and reads in part as follows:

> "that so far as appears from the record and files of my office and matters coming to my attention said Bankrupt has complied with all the orders of the Court and the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said act."

Taking this statement of the Referee, seven months after the signing of the turn-over order of February 4, 1935, what is the conclusion to be drawn from this order? We must give to the Referee, Turnbull, what the law entitles him to, that this order speaks the truth; that the Referee would not sign such an order to pave the way for the Bankrupt to be discharged if in his judgment he was not entitled to be discharged. This order is no

idle informality, but it is the established step in the procedure under the bankruptcy act, and whatever precedes the signing of this order, or whatever observations the Referee may make in any preceding order or statement, when he signs this order he gives character and standing to the Bankrupt that will entitle the Bankrupt to file his petition for discharge; but, as a mattter of safeguard both to the creditors and the Referee or Trustee, and the Bankrupt and others, still a reservation is made that all of the creditors may join in asking the Trustee to protest the discharge, or any individual creditor has reserved to him individually the right to file an individual protest. These are safeguards provided in the procedure, so that, notwithstanding the order of the Referee, there is yet open to the joint creditors or the individual creditors to file a protest against the discharge of the Bankrupt, so that if the Referee has by any imposition upon him signed such an order as that of the 23rd of September, 1935, or if the Referee has been imposed upon, misled, or any undue advantage, or any intrigue, or any fraudulent act, either on the part of the Bankrupt or on the part of the Referee, that the creditors have reserved this safeguard, that he or they may protest against the discharge of the Bankrupt. But in granting such a right to a creditor, he must come into court on the return day of the notice with his objection and his objection must be of such a character that upon its face it will appear that the Referee was misled in signing the order permitting the Bankrupt to ask for a discharge. This means that the protesting creditor must file objections, as the decisions of the Court indicate, specific in its charges as an indictment and must be verified by the individual creditor positively and not upon information and belief.

In reviewing the protest of the creditors, at this point we make the suggestion, and insist that our position is correct, that the Sun State Products Exchange protest should not have been considered by the Court and referred to the Master, Dickson, for the reason that it was filed too late. It should have been filed not later than 10 o'clock of December 2, 1935. The Court erred in referring the protest of the Sun State Produce Exchange to the Master, Dickson.

On page 31 of the transcript it recites the minutes of the Court on December 2, 1935, as follows:

> "Later, at the hour of 4:30 o'clock p. m., appearance of the Sun State Produce Exchange, objecting Creditor, by his attorney, B. W. Shipman, and the Specifications of objections to discharge are presented for filing herein, the Court orders same filed and orders same referred to the Referee, as Special Master, for hearing and report to the Court on said objections."

This, evidently, was an oversight on the part of the Court, as the hour had expired in which the Court could entertain this protest or objection.

III.

We now take up the objection of the Arizona Wax Paper Company. [Tr. pp. 23 to 36, incl.] On page 23 we call the attention of the Court to the allegation "that without four months of the bankruptcy, said Bankrupt transferred property and assets to his wife, consisting principally of moneys of the value of more than one dollar for the purpose of defrauding his then existing creditors." This objection in no manner complies with the re-

quirements or character of the objections that may be filed by a creditor against the discharge of a bankrupt. By any rule of pleading, and without any technical application of the construction of pleadings, the only conclusion that can be drawn from this objection is that four months prior to the bankruptcy petition being filed the Bankrupt gave his wife a dollar.

The next is that "subsequent to the first day of the four months" preceding the filing of the petition in bankruptcy, during the months of September, and prior to October 10, 1934, "with intent of delaying and defrauding his creditors, transferred, removed and concealed, and permitted to be removed and concealed, a portion of his property, to-wit, cash in bank and on hand, and that he transferred the same to Daisy Grande, his wife, and concealed his title thereto in said Daisy Grande's name." This is a direct charge that the bankrupt transferred cash in bank and on hand to Daisy Grande, his wife, and concealed the same in his wife's name. Now, if such a statement can be permitted under any rule of bankruptcy, any trivial objection is sufficient to defeat the discharge of a Bankrupt. If Grande had any cash in bank or on hand he could have been called before the Referee and compelled to disclose what cash he had in the bank and what cash he had on hand, and by so doing the bank could be named, the amount of cash in bank could be named, and when the same was transferred to Daisy Grande, his wife, and the charge could have been made, if it was true, specific and made to comply with the rule governing the form and character of the protest. If Grande "concealed his title thereto in said Daisy Grande's name," when was it so concealed and when was the concealment discovered, and

what action was taken on the part of the Trustee or the Referee to cause the Bankrupt to turn over this cash to the Trustee?

What is said in pointing out the insufficiency of the protest above is likewise applicable to the two following paragraphs, namely, the amount of money paid, as alleged, on the purchase of automobiles and real and personal property in the name of Daisy Grande. If there was any money paid on the purchase of automobiles, the amount could be ascertained, the automobile company could be named, and the circumstances of such transactions could be easily disclosed. The real and personal property alleged to have been purchased in the name of Daisy Grande, his wife, could be named, the amount paid, and when paid. Also, in the next paragraph, if any property was purchased in the name of Hazel D. Grande, his daughter, the property should be specifically named, when the purchase was made, and the conveyance disclosed, and it could have been easily, if true, divested from Hazel D. Grande by an order of Court against Grande and his daughter, Hazel D. Grande. But if there were any such transactions, the failure to disclose in this protest the concealment and the transaction in detail would have, upon their disclosure, defeated the very protest that is now sought to be maintained to prevent the discharge of the bankrupt, and the only construction that should have been put upon this protest of the Arizona Wax Paper Company is that the protest must be charged in general terms, otherwise if charged specifically it would clearly show that no violation of any of the bankruptcy act appeared in the details of the transactions and would have defeated the protest itself upon its very declaration of details.

On page 25 of the transcript is an acknowledgment of the execution of an instrument, rather than the verification of a complaint or petition. Recognizing the fatality and futility of this acknowledgment, on the next day Benjamin W. Shipman, attorney for the Trustee and attorney for the protestant, Arizona Wax Paper Company, on page 26 of the transcript, attempts to verify this protest. Let us analyze this verification. He says that he is attorney for the objecting creditor, Arizona Wax Paper Company; that he prepared the specification of grounds of opposition to the Bankrupt's discharge; that the copartners constituting the Arizona Wax Paper Company are not within the County of Los Angeles, and for that reason the affiant executes this verification. Then he says "the matters set forth therein appertaining to a turn-over order are true of affiant's own knowledge." Now, what does he swear to on his own knowledge. All that he swears to is that on the 4th of February, 1935, a turn-over order was made by Rupert B. Turnbull, Referee in Bankruptcy, and that he who prepared this protest attached to it a copy of the turn-over order of February 4, 1935, and then recites part of what was in the turn-over order; or, in other words, the force of his verification is simply this and this only; that the Referee in Bankruptcy made the turn-over order and that Shipman knew that such an order had been made. The other allegations, beginning in the middle of page 23 of the transcript to the concluding part on page 24, as to that portion of the protest or objection to the discharge of the Bankrupt, here is the language of Benjamin W. Shipman as to the truthfulness of these statements: "and, as to the other matters of opposition therein set forth, affiant believes them to be true"; or, in other words, the grounds upon which he bases his opposition to the discharge of the

Bankrupt, beginning in the middle of page 23 to the conclusion on page 24, and what he says therein, and he is the one who prepared it, he doesn't know anything about it and dared not swear to these alleged facts as true but sets them forth and then says, "as to the other matters of opposition therein set forth, affiant believes them to be true"; or, in other words, he doesn't know whether they are true or not. This is the very fact which prevented Benjamin W. Shipman, in preparing this objection, from specifically stating any grounds that would entitle his protest to be considered at all, because he did not know any grounds or any facts upon which to make a charge, but made them general in character, and then in his verification said he believed these matters to be true. Such protest, when tested by the requirements of the bankruptcy act and the decisions of the Court relating thereto, discloses to this Court that this procedure on behalf of the protestant, Arizona Wax Paper Company, is little less than a farce.

IV.

We have already reviewed the report of the Special Master, Hugh L. Dickson, Referee in Bankruptcy, and have pointed out decisions that are applicable to our exceptions to the report of the Special Master, beginning on page 46 and continuing through to page 60, inclusive, of the transcript, and refer to the same and refrain from embodying the same in detail in our brief, for the reason that the Bankrupt, Grande, is wholly unable to pay for any extended details, either in the transcript or the brief, and we curtail the same for that reason.

We conclude our opening brief and cite the law as we have already cited the same in our objections to the report

of the Special Master, and also as we have assigned them in assignments of error 9, 10, 11 and 12. [Tr. pp. 68 to 70, incl.]

Upon the transcript and the foregoing suggestions we submit the following errors complained of:

1. The turn-over order of February 4, 1935, was not a final order or final judgment.

2. The decision of the Judge of the District Court denying the application of the Bankrupt to be heard on review of the turn-over order was simply a declaration of the Court that we were too late. That decision, however, did not add any force to the turn-over order which would make it a final judgment.

3. The order of September 23, 1935, authorized the Bankrupt to proceed with his petition for discharge, and in so doing declared that he had done no wrong and had complied with all the rules required of him as a Bankrupt.

4. The protest or objection to the discharge by the Sun State Produce Exchange cannot be heard by this Court or given any consideration whatever, for the reason that the District Court had lost any right to consider the same, the objection and protest not having been filed until 4:30 p. m. on December 2, 1935, when it should have been filed at 10 a. m.

5. The protest of the Arizona Wax Paper Company totally fails to comply with the rule of procedure and the decisions of the Court with respect to the allegations of what the protest should contain; no specific charges are made against the Bankrupt that should prevent him from being discharged.

6. That Benjamin W. Shipman appeared in the bankruptcy procedure as attorney for the Trustee, and hav-

ing been so appointed he could not appear as special attorney or private attorney for any one of the creditors and at the same time act as attorney for the Trustee. As attorney for the Trustee he was to appear impartially for the benefit of all the creditors and to treat the Bankrupt with fairness. Having filed as attorney for both claimants, Sun State Produce Exchange and the Arizona Wax Paper Company, claims against the Bankrupt, he became special attorney for these two creditors, whose interest must of necessity conflict with his general appearance for all the creditors; or, in other words, he was attorney for all the creditors, generally, representing the Trustee, including both the Arizona Wax Paper Company and the Sun State Produce Exchange. In addition to that he was special attorney for these two protesting creditors. The Trustee, under the law and under the citations that we have made under the law, could not appear as protestant without the unanimous consent of all the creditors. If the Trustee could not appear for individual creditors as a protestant against the discharge of the Bankrupt, then his attorney could not so appear; hence, the Arizona Wax Paper Company could not, and Shipman could not enter himself as special attorney for a protesting creditor under the conditions as above stated.

With the foregoing we respectfully submit that the decision of the District Court of the United States for the Southern District of California, Central Division, be reversed and the findings of the Special Master be set aside and the Bankrupt's petition for discharge be granted.

Respectfully submitted,

James Donovan,

Attorney for Appellant.

APPENDIX.

JURISDICTION OF THE COURT.

General Bankruptcy Act, U. S. Statutes.

Petition for discharge, amendment April 24, 1933.

110 Fed. 109.

Equity Rules XX to XXV.

"Appeal shall be regulated, except as otherwise provided in the act, by rules governing appeals in equity in courts of the United States."

Amendment of April 24, 1933.

CASES CITED.

Assignment of Error IX: [Tr. p. 68; see Appendix.]

Bankruptcy Act, Sec. 14b (4).

Collier's Bankruptcy Procedure (13th ed.) Vol. 1, Sec. 14, page 493.

250 Fed. 1005,

96 Fed. 468,

248 Fed. 115.

Assignment of Error X: [Tr. p. 68 (See Appendix)].

Collier's 13th Ed. Vol. 3, p. 2548, Form No. 326.

140 Fed. 222,

173 Fed. 484,

Collier's 13th Ed. Vol. 1, p. 498, sub-section 14-b.

93 Fed. 440,

140 Fed. 222,

197 Fed. 648, [Tr. pp. 68, 69; see Appendix.]

Assignment of Error XI:

"Neither should the new master use the record of the referee upon which to base his findings."
162 Fed. 983 [see Appendix].

Assignment of Error XII:

"Ordinary rules of evidence control. Evidence will be confined to the specifications and objections."
268 Fed. 1006,
Collier's 13th Ed., Vol. 1, p. 511, Sec. 14 (3).
Collier's 13th Ed., Vol. 1-b, 520.

Under the opposition to discharge of the bankrupt, the following as to the time at which the objection to the discharge should be filed.

See:
130 Fed. 627,
108 Fed. 199.

The appearance of creditor opposing a bankrupt's discharge must be entered on the day when the creditors are required to show cause:

130 Fed. 889,
162 Fed. 912.

A failure to enter an appearance on the return day precludes the objecting creditor from filing exceptions to his discharge thereafter, even though they be filed within ten days. A creditor opposing the discharge has the duty of alleging sufficiently specific grounds of such opposition and the burden of proving them.

Holman, In re, 92 Fed. 512.

See:
104 Fed. 974,
109 Fed. 967.

ASSIGNMENT OF ERRORS.

I.

The Court erred in ordering a reference to Hugh L. Dickson, Referee in Bankruptcy, on December 2, 1935, on the following grounds:

A. That the Arizona Wax Paper Company and State Produce Exchange were the only creditors who filed objections to the discharge of Joseph H. Grande, Bankrupt.

B. That Benjamin W. Shipman is and was at all times since the Trustee in Bankruptcy was named attorney for the Trustee, William I. Heffron.

C. That said Shipman filed each of these claims as attorney for creditor before the Referee in Bankruptcy, as attorney for said creditor.

D. That on December 2, 1935, said Shipman filed each of these protests against the discharge of the bankrupt as attorney for each of said protesting creditors and verified one of the protests.

E. That there is no specific allegation in either of said protests of the Arizona Wax Paper Company or State Produce Exchange sufficient to justify the Court to refer the same to a Referee.

II.

That the Court erred in sustaining the report of the Referee in Bankruptcy, Hugh L. Dickson, in this:

A. The report shows that the Referee adopted a certain finding of his predecessor of date of February 4, 1935, without any evidence being offered covering the subject matter of said report of February 4, 1935 of his predecessor, Referee Turnbull, without giving the Bankrupt an opportunity to have investigated by Referee Dick-

son, the facts upon which the report of Referee Turnbull was made on February 4, 1935.

III.

The Court erred in sustaining the Referee's Report when there was no specific charge upon which the Master would be authorized under Section 14-b (4) of the Bankruptcy Act to act.

The Court erred in sustaining the Master's Report in this:

A. When the objection to the ground upon which the protests were made was not specifically charged.

B In sustaining the Special Master's report in reciting what his predecessor, Turnbull, as referee found in the case, for no specific charge is made upon which this finding of Referee Turnbull could be predicated.

C. In sustaining the Special Master's finding as follows: Then this Master further finds: "It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corporation, Grande-California, Inc. That, at said time, said bankrupt had many and extensive debts and at least one judgment against him." This quotation discloses that instead of the Special Master hearing evidence and making his own findings, as directed by the Court, without any evidence he adopted the above quotation as a part of the finding of his predecessor, Turnbull.

D There was no evidence offered before the Special Master to sustain the quotation of his predecessor as a part of his duty as such Special Master.

E. It was not within the jurisdiction of the Special Master to review the report of his predecessor. He was not called upon for such purpose and it was not within his jurisdiction.

IV.

The Court erred in sustaining the Referee's Report in this:

A. There was no evidence offered, or any witnesses called on behalf of the protestants. The only person present representing the hearings before the Special Master was Attorney Shipman who offered no evidence to sustain the specific charges in the protests.

V.

The Court erred in sustaining the Referee's Report in this:

A. In reviewing the former findings of Referee Turnbull the Special Master quoted the following:

"It was further found in said proceedings, (referring to the proceedings in bankruptcy), in which said findings and order have become final, that said corporation, to-wit: Grande-California, Inc., was caused to come into being and to exist for the sole purpose of permitting the said bankrupt to do business without being hindered by his creditors,"

The Special Master further found, quoting from findings of Referee Turnbull:

"It was further the conclusion of the court from the facts and the evidence that said Grande-California, Inc., was the *alter ego* of Joseph H. Grande."

Quoting again from the findings of Referee Turnbull, the Special Master quotes:

"The aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case."

VI.

The Court erred in sustaining the Referee's Report in this:

A. The report of Special Master, Dickson, as the evidence or the facts upon which the Special Master drew his conclusions was not before the Court and the record that was before the Court disclosed that there was no independent investigation made by the Special Master upon which to base his findings.

B The Special Master used this language in one of his findings:

"The testimony of the bankrupt throughout the proceedings showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. Etc."

C. The Special Master was not called to review the action of his predecessor, Turnbull, or to in anywise pass judgment upon the conclusions reached by the Referee Turnbull.

VII.

The Court erred in sustaining the Referee's Report in this:

A. The erroneous conception of the Special Master as to what his duties were and to his appointment.

B The Special Master assumed that he should pass upon the credibility of the record of his predecessor as a proper procedure under the order under which he was acting.

C. It was not the duty of the Special Master to determine whether the order made by Turnbull on February 4, 1935, was a final order.

VIII.

The Court erred in sustaining the Referee's Report in this:

A. In sustaining the report of the Special Master when the record does not disclose there was any evidence offered or before the Special Master to sustain the allegations in the protests for discharge showing, or tending to show, that any automobile, cash, merchandise, leases or contracts, or any one or all of them, were concealed, converted to, or hidden from the Trustee or that any such property mentioned ever existed at all which could be diverted from the Trustee.

IX.

The Court erred in passing upon the Appeal from the Special Master in ignoring the law applicable to the procedure in this case.

A. In Colliers Bankruptcy Procedure, 13th Edition, Vol. 1, Sec. 14, page 493, construed in 250 Fed. 1005 and in 96 Fed. 468, the Court said:

"No other creditor can file, nor can one filing speak for the others; each protesting must file specific objections and he can speak for himself alone."

In construing this section in 248 Fed. 115, the Court said:

"The Trustee could not appear as a protestant against the discharge of the bankrupt, unless authorized by all of the creditors."

B. In permitting Benjamin W. Shipman to appear in behalf of protestants as their attorney when he was still of record as the attorney for the Trustee.

X.

The Court erred in not following the rule of law announced on page 2548, Colliers 13th Edition, Vol. 3, form No. 326, which is construed in 140 Fed. 222 and 173 Fed. 484 in which the form of protest to the discharge of the bankrupt is pointed out and the necessity for specific charges. On page 498, volume 1, Colliers 13th Edition, Section 14-b (4) it reads:

"Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments." 93 Fed. 440.

"More general averments are not sufficient." 140 Fed. 222, 197 Fed. 648.

"Referee as Master should not base a finding upon original examination of the bankrupt before him as a referee."

XI.

The Court erred in sustaining the report of Special Master Dickson wherein it is shown that Special Master

adopted as evidence in this case the findings made by the Referee, Turnbull, on February 4, 1935.

"Neither should the new Master use the record of the Referee upon which to base his findings." 162 Fed. 983. And the

"Special Master should not report upon questions presented by the specifications of objections to a discharge without having examined and heard the testimony. For the presence of the witnesses in a contested controversy is vital to the proper determination."

XII.

The Court erred in failing to follow Section 14 of Colliers as above quoted, under the set of rules of evidence, proof required, this rule is laid down:

"The ordinary rules of evidence control. Evidence will be confined to the specifications and objections." 268 Fed. 1006.

"The burden of proof is upon the opposing creditor." Page 511, Vol. 1, Sec. 14 (3).

Then the following subdivisions must be established by the protesting creditor:

1. Concealment of assets must be specifically charged and proven.

2. Evidence of false oath must be clearly charged and proven, as in any other case. If the charge of perjury is made it must be supported by additional circumstances and one witness. Suspicious circumstances will not justify opposing the discharge of a bankrupt.

3. Page 520, Vol. 1-B. Commission of a crime other than those mentioned in Section 29 are not grounds for denial of bankrupt's discharge.